distinction between a contractor and an agent is sound in principle might well be questioned—it was practically denied in *Bush* v. *Steinman*, and much might be said in favor of that decision. But whether sound or not, it is clearly and immovably established by authority, and the general rule as recognised in America follows inexorably from it.

LUCIUS S. LANDRETH.

RECENT AMERICAN DECISIONS.

United States Circuit Court, District of New Hampshire.

HORNE v. BOSTON, &c., RAILROAD CO.

A railway corporation, incorporated in several states through which it runs, is, by a fiction of the law, for all purposes of jurisdiction, a citizen of each of the states; and it cannot remove a cause to the federal courts on the ground of its citizenship in the other states.

THE plaintiff, a citizen of New Hampshire, brought her action in one of the courts of that state against the defendants, as a corporation duly established and having a place of business at Exeter, in the same state, for personal injuries sustained through the fault of the defendants, at Lawrence, in the state of Massachusetts, setting her damages at more than $500.

The defendants in due season filed their petition, and moved to remove the action to this court.

The judge refused to order the removal, and his ruling has been sustained by the full bench of the Supreme Court of New Hampshire.

The defendants were first incorporated in New Hampshire by their present name, and certain short lines of railroads were from time to time constructed in Massachusetts, which together made a continuous line of road from Boston to the state of New Hampshire, and was known as the Portland and Boston Railroad.

There was a railroad chartered in Maine under which certain parts of what is now the road of the defendants in this state, were built and operated. The corporations in the three states were afterwards consolidated under substantially identical laws by which the Boston and Maine Railroad was chartered in Maine and Massachusetts as it already had been in New Hampshire. The interests of the stockholders were united upon equitable conditions agreed upon by them, while each state required certain things to be done annually by the corporation which it had chartered.

The opinion of the court was delivered by

LOWELL, J.—The Supreme Court has decided that when the same corporation owning a road which runs through several states, is chartered by each of them, it is, by a useful fiction, to be considered for the purposes of jurisdiction a citizen of each of the states: *Railroad* v. *Wheeler*, 1 Black 286. The operation of this rule is now usually avoided by chartering the company in a single state, and merely authorizing that identical company to do business in other states. In such a case it remains always a citizen of the first state: *Railroad Co.* v. *Koontz*, 104 U. S. 5; *Missouri, &c., Railroad Co.* v. *Texas, &c., Railroad Co.*, 10 Fed. Rep. 497; *Callahan* v. *L. & N. Railroad Co.*, 11 Id. 536.

If, however, there are charters in several states, the corporation when sued in one of them as a citizen of that state cannot set up that it is likewise a citizen of another; thus in *Railroad Co.* v. *Whitton*, 13 Wall. 290, a corporation chartered by Illinois and Wisconsin was sued as a citizen of Wisconsin by a citizen of Illinois. Afterwards the plaintiff himself removed the cause to the Circuit Court, and the defendant company moved to remand it on the ground that it was a citizen of Illinois; but the court held that when sued in Wisconsin as a citizen of that state, it could not deny its citizenship there. The only difference between that case and this is that here the plaintiff is a citizen of the state where the action is brought; but this does not affect the argument that the defendant company should not be permitted to deny its citizenship in this state. So it has been held in three circuits: *C. & W. I. Railroad Co.* v. *L. S. & M. S. Railroad Co.*, 5 Fed. Rep. 19; *Uphoff* v. *Chicago, &c., Railroad Co.*, 5 Id. 545 (and see the very able opinion of Judge HAMMOND in that case) *Johnson* v. *Phila., &c., Railroad Co.*, 9 Id. 6.

The case of *Chicago, &c., Railroad Co.* v. *Chicago, &c., Railroad Co.*, 6 Biss. C. C. 219, is distinguished by Judge DRUMMOND, who decided both cases in 5 Fed. Rep. 19, 545, *supra*, and his remarks will apply to *Nashua, &c., Railroad Co.* v. *Boston, &c., Railroad Co.*, 8 Fed. Rep. 458; see also *Johnson* v. *Phila., &c., Railroad Co.*, 9 Id. 6.

This being the state of the authorities I will only add that the fiction which makes two or three corporations out of what is in fact one, is established for the purpose of giving each state its

legitimate control over the charters which it grants, and that the acts and neglects of the corporation are done by it as a whole.

It is not material in considering the question of jurisdiction that the damage complained of was suffered within the limits of Massachusetts, and that the judgment will bind the corporation in that state: *Uphoff* v. *Chicago, &c., Railroad Co.*, 5 Fed. Rep. 545.

Motion to remand granted.

The general rule made in this case was that a corporation incorporated by each of several states is a citizen of each state for the purposes of jurisdiction in the federal courts, but if incorporated in one state and merely authorized to do business by another state within its territory, it is not a citizen of such state, and this for the reason that each state has control over the corporations it brings into existence.

Whilst it has been asserted (Dillon Rem. Ca. 68) that "after much uncertainty and fluctuation of opinion in the Supreme Court of the United States, the settled rule now is that a corporation for all purposes of federal jurisdiction is conclusively considered as if it were a citizen of the state which created it, and no averment or proof as to citizenship of its members is competent or material," yet the application of the rule and the reasons for its existence are not yet settled.

Beginning with the case of *Bingham* v. *Cabot*, 3 Dallas 382, and running through the cases of *Turner* v. *The Bank of North America*, 4 Dallas 8; *Turner's Adm'r.* v. *Enrille*, Id. 7; *Mossman* v. *Higginson*, Id. 12; *Abercrombie* v. *Dupuis*, 1 Cranch 343; *Waod* v. *Wagnon*, 2 Id. 1; *Capron* v. *Van Noorden*, Id. 126; *Strawbridge* v. *Curtiss*, 3 Id. 267; *Bank of United States* v. *Deveaux*, 5 Id. 61; *Hodgson* v. *Bowerbank*, Id. 303; *Corporation of New Orleans* v. *Winter*, 1 Wheat. 91; *Sullivan* v. *Fulton Steamboat Co.*, 6 Id. 450; it was ruled and reiterated that in order to maintain an action in the United States courts the parties must be citizens (men—material, social, moral and sentient beings—not corporations) of different states, and must be so averred and appear on the record—not inferred—and the cause must have existed *ab origine* between citizens of different states. See *Montalet* v. *Murray*, 4 Cranch 46; *Gibson* v. *Chew*, 16 Pet. 315; *Course* v. *Stead*, 4 Dallas 22; *Jackson* v. *Ashton*, 8 Pet. 148; *Methodist Church Case*, 4 Wash. C. C. 595.

In 1809 the question arose in three cases: *Bank of United States* v. *Deveux*, 5 Cranch 61; *Wood* v. *Insurance Co.*, Id. 57; *Insurance Co.* v. *Boardman*, Id. 78. Chief Justice MARSHALL said "that the invisible, intangible, and artificial being, the mere legal entity, a corporation aggregate, is certainly not a citizen, and cannot sue or be sued in the courts of the United States, unless the rights of the members in this respect can be exercised in the corporate name," and as "the right of a corporation to litigate depends upon the character of the members who compose it, a body corporate is not a citizen," hence judgment in the last case was reversed because the record did not show the citizenship of the corporators. This ruling was followed in *Sullivan* v. *Fulton Steamboat Co.*, 6 Wheat. 450, and *Breithaupt* v. *The Bank of Georgia*, 1 Pet. 238. In *Vicksburg Bank* v. *Slocomb*, 14 Pet. 60, the corporation was sued in the state of its charter by a citizen of a different state; but it appearing by plea that two of its corporators were citizens of the same state as the plaintiff,

the court declined jurisdiction, affirming the Circuit Court decisions in 4 Wash. C. C. 597; *Bank* v. *Willis*, 3 Sumn. 472; *Ward* v. *Arrendondo*, 1 Paine 410. This was followed in *Irvine* v. *Lowrie*, 14 Pet. 293.

In the *Bank* v. *Deveaux*, 5 Cranch 61, the court held that "a corporation is not a citizen within the meaning of the Constitution of the United States, and cannot maintain a suit in the United States courts against citizens of a different state from that by which it was chartered unless the persons who compose the corporate body are all citizens of that state." In harmony with this the court in *Bank of Augusta* v. *Earle*, 13 Pet. 519, stated that "a corporation has no legal existence out of the state which created it because it exists only in contemplation of law and by force of the law, and where that law ceases to operate the corporation can have no existence. A corporation must dwell in the place of its creation." See *Runyan's Case*, 14 Pet. 122, Federalist, No. 80. Up to this period it was certainly the doctrine that a corporation was not a citizen within the constitution or judiciary act and had no recognition in the federal courts, and this existed until 1844, when arose the case of *The Louisville, Cincinnati and Charleston Railroad Co.* v. *Letson*, 2 How. 497.

In that case a citizen of New York sued a South Carolina corporation in South Carolina, describing its corporators as citizens of South Carolina, and it appearing by plea that two of the corporators were citizens of North Carolina, the court noticed this point as being new, and held that the parties were citizens of different states, saying that the case might be placed on this ground and thus harmonize with the doctrines in former cases, and proceeds: "But there is a broader ground upon which we desire to be understood, upon which we altogether rest our present judgment, although it might be maintained upon the narrower ground already suggested. It is, that a corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person (although an artificial person), an inhabitant of the same state for the purposes of its incorporation, capable of being treated as a citizen of that state as much as a natural person." The court, however, limited the application of this language, stating that a corporation is deemed a citizen because the legal presumption is that the members of the corporation are citizens of the state which incorporated it, hence the suit is presumed to be against the members, "and no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of a court of the United States."

Here we have two distinct views: the early cases holding that a corporation is not a citizen because it is not a being but a legal entity, and the court could only take jurisdiction on the citizenship of the members (see *Insurance Co.* v. *Boardman*, 5 Cr. 57), and the *Letson case*, that a corporation is a citizen—or, which is the same thing—that although the jurisdiction depends upon the citizenship of the members of the corporation, they will be conclusively presumed to be citizens of the state which created the corporation. Presuming upon the doctrine in *Letson's case*, a corporation sought recognition in Kentucky (12 B. Mon. 212), and the court, speaking of *Letson's case*, said: "There are some expressions in that opinion which indicate that corporations may be regarded as citizens to all intents and purposes. But in saying this the court went far beyond the question before it, and to which it may be assumed that their attention was particularly directed." (See 3 Zab. 429).

In *Rundle* v. *Canal Co.*, 14 How. 80, one of the judges who assisted in the *Letson case* expressed his disapprobation of its doctrine, while another limited the

conclusions of the court to the decision of the case before it. Subsequently, in *Indiana Railroad* v. *Michigan Railroad*, 15 How. 233, this question of jurisdiction was again presented, but the case went off on another ground, and in *Marshall's Case*, 16 How. 327, the court repudiated the "presumption" part of the *Letson case*, and said that "a corporation is a citizen, because although it is an artificial person, and a mere legal entity cannot be a citizen; yet it acts and contracts by and through natural persons, and it is not reasonable that those who deal with such persons should be deprived of a valuable privilege by a syllogism, or rather sophism, which deals subtly with words and names without regard to the things or persons they are used to represent." In two subsequent cases the court followed the ruling in *Lafayette Insurance Co.* v. *French*, 18 How. 404; *Covington Drawbridge Co.* v. *Shepherd*, 20 Id. 231. Then followed the case of *Ohio and Mississippi Railroad Co.* v. *Wheeler*, 1 Black 295, decided in 1861, where the declaration stated that the railroad company is a corporation under the laws of Indiana and Ohio, having its place of business in Cincinnati, Ohio, and that Wheeler was a citizen of Indiana. Wheeler pleaded to the jurisdiction of the court, averring that he was a citizen of Indiana, and that the railroad was a citizen of Indiana, and hence the court had no jurisdiction. The railroad demurred to the plea, and Chief Justice TANEY delivered the unanimous opinion of the court that on the facts presented by the pleadings the United States courts had no jurisdiction, saying that "a suit by or against a corporation in its corporate name is a suit by or against citizens of the state which created it, hence this suit in the corporate name is a suit of the individual persons who compose it, and must therefore be regarded and treated as a suit in which citizens of Ohio and Indiana are joined as plaintiffs in an action against a citizen of Indiana. Such a suit cannot be maintained on the ground of citizenship, and it makes no difference whether suit is brought in the individual names of the corporators or the corporate name. This corporation has been chartered by Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects. It has no legal existence in either state except by the law of that state. Neither state could confer on it a corporate existence in the other state nor add to or diminish the powers to be there exercised. It may be composed of the same natural persons, but the legal entity or person which exists by force of law can have no existence beyond the limits of the state which brings it into life and endues it with its faculties and powers. The president and directors of the Ohio and Mississippi Railroad Co. are therefore a distinct and separate body in Indiana from the corporate body of the same name in Ohio, and they cannot be joined in a suit as one and the same plaintiff, nor maintain a suit in that character against a citizen of Ohio or Indiana in a United States court." As this case has been since followed it should be noticed. It decides: (1) A corporation has no existence outside of the state which created it. This is in harmony with the prior cases. (2) A corporation incorporated by two states with the same name, capacities and powers, and intended to accomplish the same objects, and spoken of in the laws of both states as one corporate body with same name and powers, is a separate and distinct corporation in each state. This is a logical sequence from the first proposition, and accords with the early cases heretofore cited; but what constitutes an act of incorporation, or a license, or a permit, is not settled. *Railroad* v. *Harris*, 12 Wall. 65; *Railroad* v. *Alabama*, 107 U. S. 581. (3) The members of a corporation are presumed to be citizens of the state which created it, and a

suit by or against a corporation in its corporate name is a suit by or against citizens of the state which created the corporation, and no averment or evidence to the contrary is admissible. This is the same as saying that a corporation is a citizen of the state which created it, and it therefore followed (4) that a suit by a corporation created by the concurrent legislation of two states is a suit of the individuals who compose it, and such individuals are citizens of the states which created the corporation. *Allegheny County* v. *C. & P. Railroad Co.*, 51 Pa. St. 230. This third position following the *Letson case* departs from all the previous decisions. The early cases held that a corporation was not a citizen. Intermediate cases held that the court will take jurisdiction when the suit was by or against the individuals who compose the corporation. The later cases, that the suit can be by or against a corporation in its corporate name, because it will be conclusively presumed that such suit is by or against the individuals who compose the corporation, and conclusively presumed that such individuals are citizens of the state which created the corporation. See *Dennistoun* v. *Railroad*, 1 Hilt. 62; *Bonaparte* v. *Railroad*, Bald. 205; *Greeley* v. *Smith*, 3 Story 76; *W. U. Tel. Co.* v. *Dickinson*, 40 Ind. 444; *Oakey* v. *Bank*, 14 La. 515; *Rosenfield* v. *Adams Ex. Co.*, 21 La. Ann. 233; *Heryford* v. *Ætna Ins. Co.*, 42 Mo. 148; *Stanley* v. *Railroad Co.*, 62 Id. 508; *Holden* v. *Insurance Co.*, 46 N. Y. 1; *Shelby* v. *Hoffman*, 7 O. St. 450; *Fargo* v. *McVicker*, 38 How. Pr. 1; *Barclay* v. *Commissioners*, 1 Wood 254; *Pomeroy* v. *Railroad Ca.*, 4 Blatchf. 120; *Hatch* v. *Railroad Co.*, 6 Id. 105; *Trust Co.* v. *Maquillan*, 3 Dill. 379; *Monnett* v. *Railroad Co.*, Id. 468; *Quigley* v. *Railroad Co.*, 11 Nev. 350; *Shaft* v. *Ins. Co.*, 67 N. Y. 544; *Railroad Co.* v. *Cary*, 28 O. St. 208; *Parsons* v. *Railroad Co.*, 1 Hughes 279; *Minott* v. *Railroad Co.*, 2 Abb. U. S. 323; *Vose* v. *Reed*, 1 Wood 647; *City of Wheeling* v. *The Mayor of Baltimore*, 1 Hughes 90; *Brownell* v. *Railroad Co.*, 3 Fed. Rep. 761; *Railroad Co.* v. *Stringer*, 32 O. St. 468; *Williams* v. *Railroad Co.*, 3 Dill 267; *Missouri Railroad* v. *Texas Railroad*, 10 Fed. Rep. 497.

In *B. & O. Railroad Co.* v. *Harris*, 12 Wall. 65, the court held that the corporation could be sued in the District of Columbia by a citizen of Virginia for an injury suffered in Virginia, and stated that as the acts passed by the Virginia legislature and by congress, by which the company entered the District of Columbia and Virginia, were substantially the same as the act of Maryland, by which the company was incorporated, it was still a Maryland corporation, and not a corporation of Virginia or of the District of Columbia. This case has never been satisfactorily understood. In the opinion the court approve *B. & O. Railroad* v. *Gallahue, Adm'rs*, 12 Gratt. 655, which held that the B. & O. Railroad Co. was a Virginia corporation *quo ad hoc* its property within the territory of Virginia. Subsequently, in *B. & O. Railroad* v. *Wightman*, 29 Gratt. 434, followed in *B. & O. Railroad* v. *Noell*, 32 Id. 394, the Court of Appeals of Virginia, in a suit to recover for an injury suffered on a road in Virginia leased by the B. & O. Railroad, held that the B. & O. Railroad was a domestic corporation, and as such could not remove a suit into the federal court, it being the lessee of a Virginia corporation, and operating the same as owner thereof, and stated that the *Harris case* was not against this position, that case deciding that the B. & O. Railroad Co. having under an act of congress constructed a lateral branch into the District of Columbia, was by reason thereof liable to suit in the district as if it had been an independent corporation of that locality. As to the *Harris case* the court further says, "the court did not rest its decision on the ground, however, that the act of congress had made

the B. & O. Railroad Co. a corporation of the District but upon the ground that the act operated as a license to the company to construct its road there, and having accepted the license, the company had placed itself in a position of a domestic corporation for all the purposes at least of being sued in that locality. The court say they could see no reason why one state may not make a corporation of another state as there organized and conducted a corporation of its own *quo ad hoc* any property within its territorial limits," citing *Maryland* v. *N. C. Railroad Co.*, 18 Md. 193; *Sprague* v. *Railroad Co.*, 5 R. I. 233; *Goshorn* v. *Supervisors*, 1 W. Va. 308; *Pa. Railroad* v. *Sly*, 65 Pa. St. 205; *Pomeroy* v. *Railroad Co.*, 4 Blatchf. 122. This position was also enunciated by the West Virginia court in several able opinions. *B. & O. Railroad Co.* v. *P., W. & Ky. Railroad*, 17 W. Va. 867; *Henen* v. *B. & O. R. R. Co.*, Id. 895; *Kephart* v. *Mahony*, 15 Id. 609; *Hall* v. *Bank of Va.*, 14 Id. 618; *B. & O. Railroad Co.* v. *Supervisors*, 3 Id. 319. But this position is adverse to *B. & O. Railroad Co.* v. *Koontz*, 104 U. S. 5; *B. & O. Railroad* v. *Carey*, 28 O. St. 208; *Railroad* v. *Stringer*, 32 Id. 468; *Brownell* v. *Railroad*, 3 Fed. Rep. 761; *Callahan* v. *Railroad*, 11 Id. 536; *Mo. Railroad* v. *Texas Railroad*, 10 Id. 497; *Chicago Railroad* v. *L., S. & M. Railroad*, 11 Reporter 323.

In *Railroad* v. *Koontz*, *supra*, the question involved was whether by taking a lease of the road of a Virginia corporation, the Maryland corporation made itself also a corporation of Virginia for all purposes connected with the use of the leased property? The Maryland corporation leased the railroad and franchise of a Virginia corporation. Neither state legislature acted in the matter. "The Maryland corporation simply occupies the position of a company carrying on an authorized business away from its home, with the consent of its own state and that of the state in which its business is done, and, therefore, it was entitled to removal, because the company, by leasing the Virginia road, *did not* become a citizen of Virginia. Its charter is the law of its existence and the *locus* of its legal residence, and it did not change its citizenship, it simply extended the field of its operations. It resides in Maryland, but does business in Virginia. A corporation is a citizen of the state which created it. It cannot migrate or change its residence without the consent of its state." It is, perhaps, questionable whether this case is in harmony with the reasoning in prior cases In *Railroad Co.* v. *Alabama*, 107 U. S. 581, the legislature of Alabama passed an act entitled "an act to incorporate The Memphis and Charleston Railroad," the preamble stating "whereas an act was passed by the state of Tennessee for the formation" of the company aforesaid, and, therefore, it was enacted that "said company shall have the right of way and enjoy the rights, powers and privileges granted by the Tennessee act of incorporation and subject to the same liabilities and restrictions imposed by said act." Then follows same special requirements, and the court held that this was an act incorporating this company in Alabama, and, although also incorporated in Tennessee, it must, as to all its doings in Alabama, be considered a citizen of Alabama. This act is substantially the same as the Virginia act concerning the B. & O. Railroad, and the court did not compare or refer to that enactment. In *The Railroad Co.* v. *Whitton*, 13 Wall. 283, the court stated that "although a corporation is an artificial person, created by legislative power, it is not a citizen within several provisions of the constitution, yet where rights of action are to be enforced it is a citizen of the state where it was created within the clause extending the judicial power of the United States to controversies between citizens of different states.

This company being, therefore, incorporated by Illinois, Wisconsin and Michigan must be regarded a citizen of each of these states." In *Muller* v. *Dows*, 94 U. S. 444, a corporation created by the laws of Iowa was consolidated with a corporation of the same name in Missouri, under the authority of each state; the court held that it was a citizen of each state, and stated that a corporation could sue and be sued, but that the suit was regarded as a suit by or against the stockholders, who were conclusively presumed to be citizens of the state which created it. And in *Steamship Co.* v. *Tugman*, 106 U. S. 118, the court said that a corporation is a citizen of the state which incorporated it, because the individual members of it are conclusively presumed to be citizens of the state which created the corporation, stating that in this it followed *Wheeler's case*, *Letson case*, *Marshall's case*, *Shepherd's case*; *Insurance Co.* v. *Ritchie*, 5 Wall. 541; *Paul* v. *Virginia*, 8 Id. 177; *Railroad Co.* v. *Harris*, 12 Id. 65. See *Railroad Co.* v. *Koontz*, 104 U. S. 5; *Railroad Co.* v. *Mississippi*, 102 Id. 135; *Kern* v. *Huidekoper*, 103 Id. 485; *Insurance Company* v. *Dunn*, 19 Wallace 214.

Although it has been asserted in several cases, since the *Letson case* and the *Marshall case*, that it is now settled that a corporation is a citizen of the state which created it, and can sue in its corporate name, for the reason that the persons who compose it will be conclusively considered citizens of such state—equivalent to saying that a corporation is a citizen—yet the reasons do not harmonize nor when compared produce the same conclusions, and if the conclusions are correct, there seems to be no reason why a corporation is not a citizen within the meaning of some of the amendments to the constitution.

A corporation is or is not a citizen. If it is, it can sue. If it is not, it cannot sue. Before the *Letson case* the courts held that a corporation was not a citizen, but that the individuals who composed it could sue and be sued in the United States courts. Since that case it has been held that a corporation can sue in its corporate name, because the individuals who compose it will be held to be citizens. Before and since that case the suit is really and in fact by and against the individuals—the natural persons—but since that case it is presumed that the suit in the name of the artificial person is a suit by and on behalf of the natural persons, hence a corporation is held to be a citizen and can sue. If a citizen, it is a citizen of the state which created it, and as a state—a sovereignty—can create a legal entity—a corporation—in any manner it pleases; a corporation can be created by one or more states; and a state can incorporate the corporation of another state, even if composed of the same natural persons. If the corporation is chartered—incorporated—it is a legal being—a citizen—of such state. If not chartered, but operating under an enabling act—a license, a permission, or a lease, or anything which does not amount to an act of incorporation—it is not a citizen of such state, because it is not by that state created a legal person or being. But when is a legislative enactment a charter or an enabling act, or a license? What distinctive elements, features or language distinguish one from the other?

The same enactment substantially was held in the *Harris case* to be a license or enabling act, and not a charter, and in the *Alabama case*, 107 U. S. 581, to be a charter. In *Marshall's case*, *Wheeler's case*, *Whitton's case*, *Muller* v. *Maryland*; *State* v. *Railroad*, 18 Md. 193; *Allegheny Co.* v. *Railroad*, 51 Pa. St. 228, and the *Va. and West Va. Cases*, the courts held the respective enactments to be charters, whilst the other cases held such acts were not charters. This question has not been settled. See *Morse* v. *Insurance Co.*, 20 Wall. 445; *Doyle*

v. *Insurance Co.*, 4 Otto 535; *Ex parte Schollenberger*, 6 Id. 369.

Intimately connected with this is the question whether or not a state court can inquire into the facts and judicially determine whether or not the case is removable from the state to the federal court and either grant or deny the application. The following cases assert that the state court has not the power: *Stewart & Cutts* v. *Mordecai*, 40 Ga. 1; *St. Anthony Falls, W. P. C.* v. *King Bridge Co.*, 23 Minn. 186; *Herryford* v. *Ætna Ins. Co.*, 42 Mo. 148; *Hatch* v. *Railroad Co.*, 9 Blatchf. 105; *Fisk* v. *Railroad Co.*, Id. 362; *Fisk* v. *Union Pac. Railroad Co.*, 8 Id. 243; *Connor* v. *Scott*, 4 Dillon 242; *Cobb* v. *Insurance Co.*, 3 Hughes 452. The following cases assert that the state court has this power: *Mahone* v. *Railroad Co.*, 111 Mass. 72; *Bryant* v. *Rich*, 106 Id. 180; *Du Vivier* v. *Hopkins*, 116 Id. 125; *Insurance Co.* v. *Garbach*, 70 Pa. St. 150; *Hadley* v. *Dunlap*, 10 O. St. 1; *Whitton* v. *Railroad Co.*, 25 Wis. 424; *Akerly* v. *Vilas*, 24 Id. 165; *The People ex rel. West'n Tran. Co.* v. *Sup. Ct.*, 34 Ill. 356; *Darst* v. *Bates*, 5 Id. 439; *Del. Railroad Const. Co.* v. *Railroad Co.*, 46 Iowa 406; *Burch* v. *Dav. & St. P. Railroad*, Id. 452; *Crane* v. *Reeder*, 28 Mich. 527; *Mabley* v. *Judge Sup. Ct.*, 41 Id. 33; *Atlas Ins. Co.* v. *Byrus*, 45 Ind. 133; *McWhinney* v. *Brinker*, 64 Id. 360; *Blair* v. *W. P. Mfg. Co.*, 7 Neb. 146; *Orosaco* v. *Gagliardo*, 22 Cal. 83; *Clarke* v. *Opdyke*, 10 Hun 383; *Carswell* v. *Schley*, 59 Ga. 19; *State ex rel. Coons* v. *Judge, &c.*, 23 La. Ann. 29; *Hanen* v. *B. & O. Railroad*, 17 W. Va. 881; *P., W. & Ky. Railroad* v. *B. & O. Railroad*, Id. 812; *Tunstall* v. *Parish of Madison*, 30 La. Ann. 471.

Under the act of 1875 a case cannot be removed unless the petition is filed "at or before the term of the state court at which the case could be first tried and before the trial"—not at the first term, but at the first term at which the cause as a cause could be tried. Under the act of 1789, sec. 12, stat. 79, the application for removal must have been made by the defendant when he entered his appearance. Under acts 1866, ch. 288, 14 stat. 306, and act 1867, ch. 196, 14 stat. 558, it might be made at any time before trial. This was the condition when the act of 1875 was passed, and the language of that act shows clearly a determination on the part of congress to change materially the time within which applications for removal were to be made. It was more liberal than the act of 1789, but not so much so as the later statutes. Under the acts of 1866–67 it was sufficient to move at any time before actual trial, while under the act of 1875 the election must be made at the first term in which the cause is in law triable. *Babbitt* v. *Clark*, 103 U. S. 606.

In *Du Vivier* v. *Hopkins*, 116 Mass. 125, the court affirmed the order of the Superior Court refusing the petition for removal. In *Mahone* v. *Railroad Co.*, 111 Mass. 72, the court stated that to remove a cause the requirements of the act of congress must be complied with. If they are not, the jurisdiction of the federal court does not attach, and whether the requirements have or have not been complied with is for the state court to determine. The case of *The People ex rel. West'n Trans. Co.* v. *The Superior Court*, 34 Ill. 356, was an application for mandamus to compel the court to remove, which was refused, and the court, in affirming the order of refusal, said: "At the hearing of the petition, the petitioner should adduce satisfactory evidence of the facts which the act of congress requires to have existed to entitle him to a removal of the cause. If there is no satisfactory evidence offered of such facts, it is the duty of the court to refuse the prayer of the petition." In *Burch* v. *Davenport* v. *St. Paul Railroad Co.*, 46 Iowa 452, the court held that if the suit is not in fact removable, it is the

duty of the state court to disregard the application. The petition presents a question of law for the determination of the state court, and the mere filing of the petition and record in the federal court *does not ipso facto* remove the case. Nor will the filing of the petition and surety in the state court divest the state court of further jurisdiction, because "the court must be satisfied by proper evidence that the facts are sufficient to authorize the removal, and for this purpose the court has a right to inquire into the facts set forth in the petition, as well as investigate the sufficiency of the surety and determine the matter accordingly." *Orosaco* v. *Gagliardo*, 22 Cal. 83.

The act of 1875 does not prescribe what the petition shall contain, but provides that when certain facts specified in the act exist, a petition may be made and filed for the removal of the suit. The existence of these facts must be ascertained by the court to which the application is made, and to that end the averments of the petition may be controverted by the opposite party. Under the act of 1789, which was like that of 1875 in this particular, affidavits or other proofs were frequently received to controvert the petition. *Clark* v. *Opdyke*, 10 Hun 383; *Anderson* v. *Manufacturers' Bank*, 14 Abb. Pr. N. S. 436; *Fisk* v. *Chicago, Rock Island & Pac. Railroad*, 3 Abb. Pr. N. S. 453; *Smith* v. *Butler*, 38 How. Pr. 192; *N. Y. Piano Co.* v. *New Haven Steamboat Co.*, 2 Abb. Pr. N. S. 357. When the state court, wherein a suit is pending, is called on to yield its jurisdiction on statutory grounds, it must inspect the documents and evidence to ascertain whether or not these statutory grounds exist. How else could the court know whether to retain or part with the cause? The state court must decide whether a given case is or is not a part of its business. The proceeding for removal is open, by petition, and contemplates a taking with leave, and not furtively by a sort of statutory larceny. The state court must know of the proceedings and see that the facts come within the requirements of the act. When they conform thereto the state court has no right or power to retain the case, and when they fail in any essential particular, it has no right or power to send the case away or order it removed. *Carswell* v. *Schley*, 59 Ga. 19. And the Supreme Court of the United States, in *Gordon* v. *Longest*, 16 Pet. 97, held the same views substantially, and stated that "it must be made to appear to the satisfaction of the state court" that the case is removable. In *Kanouse* v. *Martin*, 15 How. 198, the court said that when it appeared to the state court that the sum, citizenship and sufficiency of the surety were within the act, a case for removal was made, and it was "then the duty of the state court to accept the surety and proceed no further in the cause." In *Insurance Co.* v. *Morse*, 20 Wall. 458, Chief Justice WAITE, with whom concurred Mr. Justice DAVIS, said "the state court had jurisdiction to try the question of citizenship upon the application for removal."

After conceding the power of the state court to determine whether or not a case is removable, the Supreme Court, in *Kimball* v. *Evans*, 93 U. S. 320, said that "after final judgment has in fact been rendered by the highest court of the state in which a decision in the suit can be had, the case may be again brought here for a determination of the question arising upon the petition for removal." But to the refusal of the state court to order the removal, the record must show an exception to the ruling in order to have a standing in the federal Supreme Court upon a writ of error. *Fashnacht* v. *Frank*, 23 Wall. 416, as held in *Railroad Co.* v. *Koontz*, 104 U. S. 5: "If, after a case has been made, the state court forces the petitioner to a trial and judgment, and the highest court of the state sustains the judgment, he is entitled to a writ of error to this court *if he saves the*

question on the record. And if the exception is saved on the record, it is not necessary to protest to the exercise of jurisdiction at subsequent stages of the trial. *National Steamship Co.* v. *Tugman*, 106 U. S. 118.

The state court having acquired jurisdiction it must proceed until it is *judicially informed* that its jurisdiction over the cause has ceased or is suspended. It takes the case as made by the party himself, and need not inquire further, but it may. If that is not sufficient to oust the jurisdiction, the state court can proceed with the cause: *Insurance Co.* v. *Pechner*, 95 U. S. 183; *Amory* v. *Amory*, Id. 186; because the right of removal is statutory. Before a party can remove he must show upon the record that his case comes within the statute. His petition becomes a part of the record. It should state facts, which, taken in connection with such as already appear, entitle him to the removal. If he fails in this he has not in law shown to the court that it cannot "proceed further with the cause:" *Insurance Co.* v. *Pechner*, *supra*. In *Railway Co.* v. *Ramsey*, 22 Wall. 328, the court said: "To obtain the transfer of a suit the party desiring it must file in the state court a petition therefor, and tender the required security. Such petition must state facts sufficient to entitle him to have the transfer made. This cannot be done without showing that the Circuit Court would have jurisdiction of the suit when transferred. The one necessarily includes the other. *If upon the hearing of the petition it is sustained by the proof, the state court can proceed no further.*" The jurisdiction of the federal court must appear from the record: *The Bible Society* v. *Grove*, 101 U. S. 611. This record is made in the state court. If it does not so appear the federal court cannot take jurisdiction. If the state court has no power to investigate and pass upon the jurisdictional facts, then this question remains undetermined in any given case. The jurisdictional facts must be ascertained somewhere; the federal court cannot do it because that court takes the record as it comes from the state court, hence the facts can only be determined by the state court: *Insurance Co.* v. *Pechner*, *supra*. In the *Removal Cases*, 100 U. S. 474, the Chief Justice said: "We fully recognise the principle heretofore asserted in many cases, that the state court is not required to let go its jurisdiction until a case is made, which, upon its face, shows that the petitioner can remove the cause as a matter of right." To the same effect is *Babbitt* v. *Clark*, 103 U. S. 610; *Railroad Co.* v. *Koontz*, 104 Id. 5.

The weight of the authorities is that the state court must be judicially informed of the facts and determine them, or at least inquire whether or not the facts exist. If the state court cannot be deprived of its jurisdiction until judicially informed that its jurisdiction is suspended, then it cannot be so deprived until it judicially ascertains the truth of the assumed facts by which that suspension has been effected. The state court cannot judicially know that the jurisdictional averments of the petition are true without a judicial inquiry, and it cannot make such inquiry unless it has the power to controvert the averments alleged. The state court had the rightful jurisdiction of the cause before the filing of the petition, and unless the averments of the petition are true, its jurisdiction continues, because a mere fiction or falsehood cannot transfer its jurisdiction. Then must the court which has the rightful jurisdiction, upon a mere suggestion of facts, which may be true or false, surrender its jurisdiction to a court which can have jurisdiction only in the event that the facts are true? If this is correct then this absurdity follows: the court which has

jurisdiction must decline to exercise it until a court which may have none may see proper to decline it. Such a construction of the statutes is not only unreasonable, but is in conflict with the most elementary principles of constitutional government.

In *White* v. *Holt, Judge, et al.*, 20 W. Va. 814, the C. & O. Railroad, being defendant in the court below, made an application in the state court for removal, which was denied; it then obtained a continuance and procured transcript of the record, and docketed the case in the federal court. At the next term of the state court the order of the federal court docketing the case was presented, and the court refused "to proceed further in the case." In the federal court, whilst proceedings for mandamus were pending in the state court, a nonsuit was procured, and then an injunction from the federal court to restrain the mandamus proceedings in the state courts. Chief Justice JOHNSON, in an able and exhaustive opinion, said: "The filing of the transcript and the docketing of the case in the federal court after the filing of the petition and bond, did not and could not remove the case. When the state Circuit Court refused the petition of the defendant, the proper course for it to have pursued was to submit to the refusal, proceed with the trial, and in case of an adverse judgment take an appeal to this court, and if the judgment of the court below had been affirmed, obtain a writ of error from the Supreme Court of the United States, which alone can finally decide the question." This method was pursued until *Railroad Co.* v. *Whitton*, 13 Wall. 270, decided in 1871. Since then there are several instances where federal courts have assumed jurisdiction upon the filing of the transcript and docketing of the cases, from whence they went to the Supreme Court of the United States. Amongst which are the *Removal Cases*, 100 U. S. 427; and *Bondurant* v. *Watson*, 103 Id. 281.

In 1864, Judge DRUMMOND, in *Hough* v. *Trans. Co.*, 1 Biss. 425, said: "The acts of Congress have given certain legal discretion to the judge of the state court, not that thereby the defendant is deprived of the right which the statute gives him, but that it is competent for the appellate state court to redress the wrong if wrong has been done to the defendant, by correcting the errors of the court below. If the highest state court will not do that, the defendant has his remedy by writ of error to the Supreme Court of the United States. All cases in which the question has arisen have gone to the Supreme Court of the United States in this way, and the error of the state court, where any existed, has been rectified in this way." See *Hadley* v. *Dunlap*, 10 O. St. 1.

This course would preserve the harmony of our dual system of government, and prevent the unhappy conflicts of jurisdiction which are so frequent today between state and federal courts.

This brings up the question whether or not the order granting or refusing the removal is appealable. The negative was announced in *Gordon* v. *Longest*, 16 Pet. 104. In *Akerly* v. *Vilas*, 24 Wis. 165, the court held that such an order was appealable, and the state courts had jurisdiction to hear and determine the appeal. Judge PAINE, who delivered the opinion, said, that "nothing is better settled than that an order by which a subordinate court dismisses a case for want of jurisdiction, or in any way divests itself of jurisdiction, is subject to review on appeal." In the *Mayor* v. *Cooper*, 6 Wall. 247, the court held that the power to hear and determine an appeal from an order by which a subordinate court attempts to assume or divest itself of jurisdiction, is not an assertion of jurisdiction. In

Nelson v. *Leland et al.*, 22 How. 48, the court said: "The question of jurisdiction in the lower court is a proper one for appeal," and the determination of this question is not the exercise of jurisdiction on the merits. In *Kanouse* v. *Martin*, 15 How. 198, the state Court of Common Pleas denied the application for removal, tried the case and rendered judgment. Appealed to Superior Court and judgment affirmed. Supreme Court United States reversed the judgment on the ground that the case was removable, but conceded the power of the Superior Court to determine the appeal: *Strander* v. *W. Va.*, 10 Otto 303. In *State ex. rel. Coons* v. *The Judges 13th Jud. Dist.*, 23 La. Ann. 29, the court said that the application for removal is analogous to a plea to the jurisdiction, and when granted, the order is appealable. This was followed in *Rosenfield* v. *The Adams Ex. Co.*, 21 La. Ann. 233; *Beebe* v. *Armstrong*, 11 Mart. 440; *Duncan* v. *Hampton*, 12 Id. 92; *State Bank* v. *Morgan*, 4 N. S. 344; *Fritz's Syndic* v. *Hayden*, Id. 653; *Fisk* v. *Fisk*, Id. 676. In *Burson* v. *The Park National Bank of New York*, 40 Ind. 173, 13 Am. Rep. 285, the court held that the order of removal was appealable. Judge DOWNEY, in delivering the opinion, held that when the order had been granted or refused, it was the duty of the court, on appeal, to decide the correctness of the ruling, and that if erroneous, it should be reversed, but that if correct, the case should be remanded with instructions. That when the order was refused the cause remained pending, and it was not then a final order or judgment: citing *Skeen* v. *Huntington*, 25 Ind. 510. The court further said "It is true that the act of congress provides that when the application has been made in the proper manner for the removal, the state court shall proceed no further in the cause. But this does not settle the question. The question is not, shall the subordinate state court proceed no further? but may the party who has thus been prevented from having the cause tried in the court in which the suit was pending, appeal to this court. If he cannot, when and to whom is he to look for a correction of the most flagrant errors and abuses resulting from the action of the subordinate court." The court overrules *The City of Aurora* v. *West*, 25 Ind. 148, and cites *Akerly* v. *Vilas*, 24 Wis. 165; s. c. 1 Am. Rep. 166; *Whitton* v. *Railroad Co.*, 25 Id. 424; 3 Id. 101; *Insurance Co.* v. *Dunn*, 20 O. St. 175; 5 Am. Rep. 642; *Kanouse* v. *Martin*, 15 How. (U. S.) 198; *Beery* v. *Irick*, 22 Gratt. 484.

JOHN F. KELLY.

Bellaire, Ohio.

Supreme Court of Minnesota.

OLSON *v.* CROSSMAN.

An innkeeper is by the common law responsible for the loss in his inn of the goods of a traveller who is his guest, except when the loss arises from the negligence of the guest, the act of God or of the public enemy. To absolve the innkeeper from liability when the loss has been proved, it must affirmatively appear that the loss arose from one of the above-mentioned exceptions.

A guest is not to be charged with negligence merely because the theft was com-